

APR 19 1973

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1972

No. 1058

EDWARD F. O'BRIEN, on behalf of himself and all others similarly situated in Monroe County as named below, LEONARD POLITO, KEVIN INGHAM, BRINT LYLES, RONALD FREY, JEFFREY HOWLAND, WILLIE F. CLAY, VERNON CANNON, RICHARD STOCUM, LARRY RANDALL, JOHN HENRY, ANNE DELYSER, ALICE ELIZABETH ZAHN, LORRAINE ELSAW, CHRISTINE VERSTRATEN, JEANNE MITCHELL, JOHN CHATMAN, CHERRY BULLOCK, MARSHA PADILLA, CLYDE PHILLIPS, BERNICE MOGAN, JAMES DONALDSON, RICHARD HACKLEY, LOUIE GIORGIONE, MITCHELL STRONG, WILLIAM WYNN, FELIX QUINONES, MAURICE WOOD, DONALD KENYON, MICHAEL MARRAPESE, ALEXANDER RIOLA, ROBERT MITCHELL, Jr., WILLIE BALKUM, STANLEY ROSS, JIMMIE JACKSON, ANIBAL CINTRON, GEORGE M. KOWALSKI, DELLIE L. RANDALL, JOSEPH NUCIOLA, LLOYD S. GRIFFIN, HERMAN L. PETERSON, BRUCE G. ELDRIDGE, ROBERT F. FRIED, FRED DUNBAR, CURTIS GRIMES, JAMES W. GILFIN, DANIEL ALAIMO, ROBERT G. EVANS, ROBERT L. JONES, MARIO C. DELEON, EMANUEL RUSSO, MCKINLEY LUNDY, Jr., JIMMIE RICHARDSON, EDDIE KENDRICKS, WILLIE KENNEDY, KENNETH HARTWIGH, TIMOTHY INGRAM, DONALD SWYSTUN, ROBERT L. AGNESS, RICHARD A. WERTH, MICHAEL HAYES, GREGORY HEALY, GARY RAMSEY, JOHNNY PARNELL, JESSE PURITT, Sr., GEORGE SMITH, DONALD SCHULZ, WILLIAM SHEPARDSON, EDDIE J. HENLEY, GEORGE X. GRANSTON, Jr., MIGUEL BALDRICH, ROBERT A. HUTCHINGS,

*Appellants,**against*

ALBERT SKINNER, Sheriff, Monroe County, and KENNETH POWER and ROBERT NORTHRUP, et al., being the MONROE COUNTY BOARD OF ELECTIONS,

Appellees.

On Appeal From The Court of Appeals of The State of New York

MOTION TO DISMISS

WILLIAM J. STEVENS

Attorney for Appellees

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MOTION TO DISMISS

Jurisdictional Statement

The paragraph entitled *Jurisdictional Statement* of the Appellants is substantially correct except the Appellees feel there is no substantial Federal question in this matter.

Opinions Below

The paragraph entitled *Opinions Below* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Jurisdiction

The paragraph entitled *Jurisdiction* in the *Jurisdictional Statement* of the Appellants is substantially correct except that the Appellees feel that the New York Election Law, §§ 153-a and 117-a, are not repugnant to the Constitution of the United States.

The Statutes Involved

The paragraph entitled *The Statutes Involved* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Questions Presented

The paragraph entitled *Questions Presented* in the *Jurisdictional Statement* of the Appellants is substantially correct.

Statement

The *Statement* in the *Jurisdictional Statement* of the Appellants is substantially correct except they fail to indicate that the seventy-two named prisoners in the Monroe County Jail were solicited by the League of Women Voters and asked to register and vote by the circulation of a form to the Jail population. (Exhibit A)

MOTION TO DISMISS

The Court should dismiss this case in that it has no jurisdiction because there is no substantial Federal question. There is no substantial Federal question because the attack upon

the statutes in question is essentially fictitious. *Bailey v. Paterson*, 369 U.S. 31, 33; 883 S. Ct. 549, 556; 7 L. ed. 2d, 512 (1962) and is obviously without merit. *Ex parte Poresky*, 290 U.S. 30, 32; 54 S. Ct. 3.

The Appellant's claim is unsound to the above reasons in that previous decisions of this Court foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. *Ex parte Poresky*, supra 290 U.S. at 32, 54 S. Ct. at 4.

The questions that are presented in this case have been decided by this Court in *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). In this case an Illinois statute provided that persons physically incapacitated were allowed to register and vote by absentee method. The Illinois statute, although more artfully drawn than the New York statute, was substantially similar to the sections of the New York Election Law under attack by the Appellants. This Court upheld the decision of the Lower Court in dismissing an action brought by prisoners awaiting trial or serving sentences as misdemeanants on the ground that the Illinois statute did not provide for the registration and voting of such persons. This Court upheld the decision of the Lower Court in that

1. There was nothing to show that jail inmates were absolutely prohibited from exercising their franchise to vote;

2. Failure to include prisoners under the statute is not arbitrary as other classes were also excluded;

3. Prisoners are not physically disabled under the meaning of the Illinois statute;

4. The Court refers to the Illinois scheme as "remedial" (Pages 809, 811) and upheld the statute by applying the principle that remedial legislation is not invalid merely because it does not cover all classes of persons who might benefit from it. (See also *Fidel v. Board of Elections*, 343 F. Supp. 913, affd. 41 Law Week 3245 [1973].)

The Appellants rely on *Goosby v. Osser*, 93 S. Ct. 854 (1973) in trying to establish jurisdiction in the instant case. In *Goosby* this Court required the convening of a three judge Court to determine whether a Pennsylvania statute specifically precluded prisoners unable to make bail or held on non-bailable offenses from voting or registering as in this matter there was a substantial Federal question. This case is clearly distinguishable from the instant case which fits the facts of *McDonald*.

The New York statutes do not provide absolute prohibition from voting or registering as the Pennsylvania statute does. Indeed the New York statutes in question can be treated in the same way the Illinois statutes were treated in *McDonald* as reform measures which serve to extend the franchise to those who had previously been unable to exercise it and thus are remedial. These statutes should not be invalidated merely because the statute does not cover all classes of persons who might benefit.

The principle in the instant case was adopted by the New York State Court of Appeals and the rationale is contained in the decision of Judge Scileppi which appears on Page 26 of the *Jurisdictional Statement* of the Appellants. Judge Scileppi felt that the provisions of the New York statutes have no direct impact on the petitioner's right to vote but merely is a claimed right to absentee ballots and registration and as these provisions have no direct impact on the petitioner's right to vote, they need only be reasonable in light of the scheme's purposes in order to be sustained. The New York Court of Appeals felt that it was for the Legislature, not the Courts to extend further those to be included under the statute.

As this Court has decided the matter in question in *McDonald*, there is no room for the inference that the question sought to be raised can be the subject of controversy as *McDonald* forecloses the subject.

CONCLUSION

The attack upon the statutes in question is without merit and should be dismissed.

Respectfully submitted,

WILLIAM J. STEVENS

Attorney for Appellees

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EXHIBIT A

October 6, 1972

To: Prisoners awaiting trial and
 Prisoners convicted of crimes other than felonies
 From: League of Women Voters and American Civil Liberties
 Union

You have NOT lost your RIGHT to VOTE or your RIGHT to
 REGISTER because you are in jail.

No one has ever voted from jail here before. No system has been
 set up to handle it.

But if YOU want to register and/or vote, we'll go to bat for you.
 We'll see if we can get rid of the stumbling blocks to your voting.

We need your name, home address, and signature NOW.
 Registration closes Tuesday, October 10.

To vote here you must be at least 18 years old, a citizen and a
 resident of Monroe County AND YOU MUST BE
 REGISTERED.

If you want to vote, fill out the form below.

Yes, I want to register. X

Check one or both

Yes, I want to vote. X

Name: /s/ Louis P. Giorgione
 (please print)

Home address: 173 Kuhn Rd.
 (street)

Rochester, N.Y. Zip 14612
 (town or city)

Signature: /s/ Louis P. Giorgione